No. 12299.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PAUL GAWZNER and IRENE GAWZNER,

Appellants,

vs.

LEO LEBENBAUM,

Appellee.

LEO LEBENBAUM,

Appellant,

vs.

PAUL GAWZNER and IRENE GAWZNER,

Appellees.

RESPONDENT LEBENBAUM'S BRIEF.

FILED

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RESPONDENT LEBENBAUM'S BRIEF.

I.

Opinions Below.

The opinions below are correctly described and referred to in Appellant, Lebenbaum's Opening Brief (L.O.B. p. 1).*

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*Throughout this brief Lebenbaum's Opening Brief will be indicated as L.O.B.; Gawzner's as G.O.B.; the printed transcript of the record as R., the findings in the judgment appealed from as F., and the conclusions therein as C. The United States will be called Government; the area under Lebenbaum's lease, the leased area, the remainder, the unleased area. Emphasis is supplied unless otherwise noted.

II.

Jurisdiction.

All jurisdictional matters are correctly set forth and referred to in said Opening Brief (L.O.B. p. 2) excepting that no reference was made to Lebenbaum's Cost Bond on Appeal [R. 245-246].

III.

Statement of the Case.

In his opening brief Lebenbaum has given a "Succinct Statement of the Case" (L.O.B. pp. 3-5) and an "Extended Statement" (L.O.B. pp. 5-12). Gawzners include a "Concise Abstract of Case" in their opening brief (G.O.B. pp. 3-6). While that latter is in part accurate, it contains conclusions and omissions which will be hereinafter noted and which, Lebenbaum believes, make his statements the more reliable.

1. The first paragraph in Gawzner's "Concise Abstract" is inaccurate in omitting reference to paragraph Thirteen of the lease [R. 294] which *limited* Lebenbaum's obligations under paragraph Five [R. 285] and Seven [R. 287-290] which are referred to. The trial court noted such limitation [R. 178-179] and gave it proper and necessary consideration in determining that through apportioning to themselves restoration not paid for by the Government [R. 98, 55], *i. e.,* for ordinary wear and tear, appellants Gawzner and Lebenbaum had *reduced* the balance of the *agreed award,* which had been paid into the registry of the Court to a sum *less than* the reasonable rental value of the leased and unleased areas and that, for such reason, the rental compensation for *each area*

must be *ratably reduced* [R. 179-182; 228-232; Fs. 15-22, incl.].

2. While the second paragraph of Gawzner's "Concise Abstract" is technically correct in that it discloses that it is only a *partial* quotation and indicates the omission in a customary format, it is not a *fair* or *accurate abstract.* It omits the very language which *limits* the condemnation clause to *particular condemnations* by *particular condemnors* [L.O.B. pp. 22-31; R. 291-292].

3. In the first complete paragraph on page 4 of their opening brief, Gawzners state that "Lebenbaum made only limited restoration of the premises." Such statement is not true and there is no supporting evidence in the record!

4. In the paragraph next following, Gawzners state "and Gawzners completed the restoration of all of the property and the repair and replacement of furniture and equipment." Such statement is not true and there is no supporting evidence in the record!

Ordinarily, Lebenbaum would ignore such unwarranted asseverations, since they are without record support, but he departs from such ordinary course, in this brief, for the following reasons:

(a) Throughout this cause Gawzners have contended that the trial court had jurisdiction to bind Lebenbaum under the rule of *res judicata* as to the rights and obliga-

tions of appellants *inter se*—not connected with their several rights *as against the Government*—and it is assumed that they will so assert in this court and in the state court as hereinafter referred to.

(b) In Exhibit B [R. 82-86] annexed to Gawzner's answer to the Third Amended Complaint [R. 72-86], there is contained a paragraph I [R. 84] which requires Lebenbaum to "comply with the terms of the lease."

(c) While this agreement expressly excepts the period which is the subject matter of this appeal [R. 85] Gawzners have filed an action in the Superior Court of Santa Barbara County, California, entitled *"Paul Gawzner, et al. v. Leo Lebenbaum, et al.,* No. 39518," which is now pending, and in which they allege that Lebenbaum has defaulted in respect to his obligation as to restoration and that they have fully performed. Also, regularly during each month since Lebenbaum was returned to possession by the trial court [R. 16], Gawzners have written Lebenbaum a letter re-asserting the existence of such alleged default [Appdx. i].

(d) Hence, Lebenbaum does not want this court to assume, by Gawzner's unsupported asseverations and his silence, that such statements are true and, particularly, desires to avoid the possibility that this Court, considering the statements *insignificant and undisputed* details, might inadvertently adopt them in its factual statement in its decision of this cause and thus give Gawzners an opportunity to cite such statements as *res judicata* in the State suits!

IV.

Gawzners' Specifications of Alleged Error.

Gawzners' Opening Brief contains a veritable *potpourri* of alleged errors by the trial court, consisting of 17 divisions and 8 subdivisions. We will examine each of them to the extent deemed necessary but believe that they can be appropriately grouped into the following summaries:

1. The Court erred because it refused to declare the lease, and the compensation from the Government for the use of the leased area, forfeited to Gawzners (G.O.B. p. 8—points 1 and 2; pp. 13-25).

2. The Court erred in the measure of compensation which it applied in awarding the rental compensation (G.O.B. pp. 8-13—points 4-15; pp. 26-44).

3. The Court erred in ratably reducing the agreed rental apportioned for the unleased area (G.O.B. pp. 9-11—points 5-10; pp. 45-46).

4. The Court erred in refusing leave to file portions of Gawzners' proposed Cross-Complaint (G.O.B. p. 13—point 16; p. 48).

5. The Court erred in not signing the findings submitted by Gawzner (G.O.B. p. 13—point 17).

ARGUMENT.

I.

The Court Did Not Err in Refusing to Declare the Lease, and the Compensation From the Government for the Use of the Leased Area, Forfeited to Gawzners.

1. The Court Did Not Err in Refusing to Declare the Lease Forfeited and Terminated.

The Court did so refuse [R. 234-235; C. 2]. But, as we have already shown in our opening brief (L.O.B. pp. 22-33), such portion of the Court's decision was correct and is supported by the record and the law.

An examination of the argument of Gawzners upon this issue discloses misstatements, misconceptions and the complete ignoring of language in the lease which distinguishes its provisions from those in the cases cited by them and from what is commonly termed a general condemnation clause.

On page 14, Gawzners state:

> "No contention was made that the language of the condemnation clause was ambiguous * * *." (L.O.B. p. 14.)

The opinions of Judge Hollzer (61 Fed. Supp. 268) and Judge Weinberger [R. 16] refute this misstatement.

Throughout their discussion of paragraph Ten [R. 291] [the condemnation clause] they ignore the limiting words or clauses "such," "in any such" and the proviso that the condemnation should be one in which *assessments were levied*. In short, they ignore the evident fact that paragraph Ten was limited in its scope to a particular

kind of condemnation proceeding and that, thereby, this *federal* proceeding was excluded!

In such discussion they also ignore the provisions of paragraphs Fourteen [R. 295] and Twenty-two [R. 299] in which the United States *is named* when it is intended that the lease apply to it.

And they also ignore the applicable *California* law which *requires,* if possible, a construction which will avoid the *forfeiture of an estate* (L.O.B. p. 24, and cases cited).

We believe Gawzners have also misconstrued the authorities and decisions which they cite upon this point (G.O.B. pp. 18-25) if they conceive them to be applicable to Paragraph Ten of the Lebenbaum lease. Before analyzing such authorities and decisions, we repeat here the summation set forth in Lebenbaum's opening brief (L.O.B. p. 32):

> "Summarizing, we do not dispute that a general condemnation clause may result in a forfeiture of a tenant's right to a condemnation award. We do not dispute that the term 'other public body' may be used to include the United States or that it is a 'public body.' We do not dispute that the instant case involves an eminent domain proceeding for 'a public purpose.' We *do* assert that paragraph Ten is not a general condemnation clause but is a *limited* condemnation provision covering a particular kind of eminent domain proceedings only and that it, manifestly, was never intended to include the United States nor this type of a condemnation proceeding."

The quotation from 18 Am. Jur. 866, Eminent Domain, Sec. 232 is irrelevant. The *condition* stated therein (G.O.B. p. 18) *"if applicable to the particular case"* is not present in our case.

This, also, eliminates *U. S. v. Petty Motors Company,* 327 U. S. 372, 375, 90 L. Ed. 729, 733 (G.O.B. p. 15) on this point, because the quoted clause expressly included *Federal* takings *by name.*

Likewise, Gawzners' quotations from *U. S. v. Improved Premises, etc.,* 54 Fed. Supp. 469 (G.O.B. p. 19); *U. S. v. 21,815 Sq. Ft. of Land, etc.,* 59 Fed. Supp. 219 (G.O.B. p. 21); *U. S. v. 10620 Sq. Ft. etc.,* 62 Fed. Supp. 115 (G.O.B. p. 23), and *U. S. v. 45,000 Sq. Ft. of Land, etc.,* 62 Fed. Supp. 121 (G.O.B. p. 24) are irrelevant here because each of those decisions construed and applied the provisions of *general condemnation clauses* which contained no language evidencing an intention to limit the type of proceeding or condemning body; nor did any of such decisions treat of a condemnation clause which was capable of several constructions, one of which would avoid a forfeiture; nor did any of them construe a lease *made in California,* whose laws *require* such construction to avoid a forfeiture of an estate if at all possible.

The Gawzner quotations from *U. S. v. Land,* 57 Fed. Supp. 548 (G.O.B. p. 20), and from *Strasszula v. Fargo Estate Trust,* 152 F. 2d 61 (G.O.B. p. 22), like their quotation from paragraph Ten (G.O.B. p. 3), are incomplete.

Both of these cases involve a lease made in Massachusetts. The full text of the condemnation clause is reported in the District Court decision (57 Fed. Supp. 549). It contained no word, clause or sentence indicating that it did not apply to *any* condemnation proceeding by *any* condemnor.

To the contrary, it read:

> "the said premises, or any part * * * shall be taken * * * by the action of *any* public authorities."

Massachusetts law requires a strict construction *in favor* of such forfeitures (*Goodyear, etc. v. Boston Terminal Co.*, 176 Mass. 115, 57 N. E. 214). The Court of Appeals for the First Circuit said, in citing the *Goodyear* case, *supra*:

> "The law governing appellant's (lessee's) claim is the *law of Massachusetts.* Hence in accordance with (that law) the judgment is affirmed."

Of course, our summation, just requoted, discloses that we take no issue with the general statements of Gawzners that the United States is a "public body" and this proceeding was for a "public purpose" (G.O.B. pp. 24-25).

2. The Court Did Not Err in Refusing to Declare the Compensation From the Government for the Use of the Leased Area Forfeited to Gawzners.

The Court did so refuse [R. 235, C. 4], and we have shown that such ruling was correct (L.O.B. pp. 28-29). To keep this reply within proper bounds we desist from further analysis of the decisions cited by Gawzner, except to requote, with added emphasis, from the *Petty Motors* case (G.O.B. p. 19):

> "* * * with *this type* of clause, at least in the *absence of a contrary state rule* * * *."

Here we have a *different type* of clause and a *strict state rule* of construction *to avoid a forfeiture,* if possible.

Furthermore, Gawzners' quotation does not even complete the sentence quoted from [G.O.B. p. 24; R. 291].

II.

The Court Did Err in the Measure of Compensation Which It Applied in Awarding the Rental Compensation.

Lebenbaum is in the anamolous situation of agreeing with Gawzners that the trial court erred in fixing and awarding the rental compensation. He, also, finds himself in accord with them that the $113,704 remaining in the registry represented the *agreed rental* compensation for the leased and unleased areas (L.O.B. pp. 42-44; G.O.B. p. 27).

But, from that point, the positions of the parties are contradictory:

1. Lebenbaum asserts that the court erred because it did not award *all* of the rental for the leased area *to him*. Gawzners, because *they* did not receive the *entire* award. Aside from the factor of forfeiture or assignment which will be controlled by the decision as to point I, *supra,* their controversy lies in the assertion of Lebenbaum that no interest was taken by the Government in the leased area, which was compensable by the Government, except a *portion of Lebenbaum's interest* (L.O.B. pp. 34-39); that, since he continued liable for the contract rent, *he alone* is entitled to the full compensation for such taking *from him* and that such full compensation *includes* the equivalent of the rent he is obligated to pay under his lease (L.O.B. pp. 39-41).

Gawzners assert that, if the lease continues, they, nevertheless, are entitled to receive their rent, as fixed in the lease, as *a part of their compensation from the Government* and, that, absent proof of *bonus value* in Lebenbaum's lease, they are entitled to *all of the rental for the leased area* (G.O.B. pp. 28, 36-37).

We have just referred to the portions of Lebenbaum's Opening Brief which refute Gawzners' contentions. Gawzners overlook the basic reasons why the *tenant only* (*i. e.,* Lebenbaum) *must receive* the equivalent of his obligation to pay rent *to make him whole!*

> "If a condemnation of part of the premises will not discharge the tenant's covenant to pay rent, neither will it operate to apportion the rent so as to relieve the tenant of any portion of his liability to the lessor. Apportionment of the rent does not mean abatement of it, because, though rent may be apportioned, the tenant still remains liable to pay the whole of it * * *.
>
> "As the tenant's estate is entirely distinct from the landlord's and as *both* are within the protection of the Constitution, each must be awarded in money an amount equivalent to the value of that which is taken from him and as parts of the premises are taken from (his) possession without thereby releasing him from his covenant to pay the whole rent * * * allowance must necessarily be made for the rent to be paid for (that) of which he is deprived because the obligation of his contract to pay the entire rent is not, and under settled constitutional guarantees cannot be, impaired or abridged by condemnation proceedings which * * * ignore that obligation as an element of substantial injury * * *." (Insertions added.)
>
> *Gluck, etc. v. Baltimore,* 81 Md. 315, 325, 32 Atl. 515, 516-517.
>
> "* * * The lessee continuing personally liable, but losing his estate and right to its enjoyment, would be entitled to receive *not merely the value of the term, but also* a sum of money equivalent to the present value of the sum of the rents payable *in futuro,* 'that

is, he should receive the value of his term subject to the rent (*i. e.,* the bonus value), *and* such *further sum* as would be considered a present equivalent for the rent thereafter to be paid * * *.' " (Insertions added.)

Pasadena v. Porter, 201 Cal. 381, 387, 257 Pac. 526, 528.

"The court sitting (in eminent domain) *has no power* to reform or revise the lease in question, nor to determine to what extent the covenant to pay rent shall be affected, if at all. The tenant cannot *compel* the landlord to accept a lessened rent. Neither can the landlord *force* a readjustment of the rent." (Insertions added.)

Pasadena v. Porter, 201 Cal. 381, 388, 257 Pac. 526, 529.

Gawzners rely upon *U. S. v. Petty Motor Company,* 327 U. S. 372, 381, 90 L. Ed. 729, 736 (G.O.B. p. 36) and quote from a statement defining *a* measure of damages:

"The measure of damages is the difference between the value of the use and occupancy of the leasehold for the remainder of the tenant's term, * * * Less the agreed rent which the tenant would pay for such use and occupancy."

They ignore the fact that the quoted definition was the *constitutional measure* under the Fifth Amendment (U. S. Rep. 377, L. Ed. 734) for the taking of *all* of the remainder of Petty's lease:

"The Petty Motor Company held a lease which expired October 31, 1943, with an option for an additional year * * *." (U. S. Rep. 733, L. Ed. 375);

"The value of the remainder of the term of Petty Motor Company's lease includes the value of the right to a renewal for a year * * * as well as the value of the period, ending October 31, 1932 * * * (U. S. Rep. 380, L. Ed. 736);

"* * * These facts, we conclude, resulted in the taking by the United States of the temporary use of the building until June 30, 1945, * * *." (U. S. Rep. 374-375, L. Ed. 733);

"* * * consequently (Petty's) *rights* under the lease *ended before* those which the Government sought by its petition * * * (U. S. Rep. 375, L. Ed. 733.) (Insertion added);

"U. S. v. General Motors Corp. (323 U. S. 373, 89 L. Ed. 311) was a different case. In it only a *portion* of the lease was taken * * * (U. S. Rep. 379, L. Ed. 735);

"There is a *fundamental difference* between the taking of a *part* of a lease and the taking of the *whole* lease." (U. S. Rep. 379, L. Ed. 735.)

It was in the light of such *factual determination* and *legal conclusions* that the Supreme Court defined the measure to be applied for taking *all* of Petty's remaining leasehold estate.

The Supreme Court has never said that the landlord is entitled to share in an award for the taking of a *portion* of the tenant's term where the tenant remains liable on the lease. Inferentially, at least, it has held to the contrary (Appendix ii).

It is difficult to see where Gawzners get comfort from *John Hancock, etc. v. U. S.*, 155 F. 2d 977, 978 (G.O.B. pp. 37-38). We relied upon it. (L.O.B. pp. 41, 56).

We repeat a portion of Gawzner's quotations, with appropriate emphasis:

> "If, after a condemnation, a lessee *remains under obligation* to pay rent, it is entitled to damages equal to the fair rental value of the permises * * *.
>
> "* * * In (U. S. v. General Motors) the tenant was under a *continuing obligation* to pay rent and hence was entitled to the fair rental value *undiminished by the rental under the lease* * * *."

We have shown that such is the California rule (L.O.B. pp. 40-41) and *Pasadena v. Porter, supra.*

Gawzners seem to believe the rule is different if the *tenant is liable for but has not paid* the rent (G.O.B. p. 38). The Court of Appeals says "remains under obligation to pay," not "has paid," the rent. Furthermore, Lebenbaum *did pay* until *Gowzners refused to accept* further rent [R. 226; F. 12, 13; 202; 83; 117, 348-349; 8 par. 1; 11-12].

Gawzners rely on *Galvin v. Southern Hotel Corp.,* 164 F. 2d 791 (G.O.B. pp. 38, 39]. That was a *Declaration of Taking case* (L.O.B. p. 53, 154 F. 2d 970, 971), and the Court of Appeals therein held that the tenant had *wilfully defaulted* before the Government condemned and that he had wilfully failed to abide by the conditions which the Court had imposed in 154 F. 2d 970 for relief from his default. Also, it is *contrary to California law.*

In a somewhat *oblique* manner, Gawzners may be relying upon *U. S. v. 26,699 Acres of Land, etc.,* 174 F. 2d 367, from which they quote (G.O.B. p. 44):

> "If the lease was cancelled by appellees [lessees], no recovery ought to be had by them, or, if the lease

was merely *suspended* because of the pendency of the condemnation proceedings, any damages to Appellees must be diminished by the annual rent *which they were relieved from paying,* if any."

It is evident that they misconstrue or ignore the portions we have emphasized. Of course, if the eminent domain proceedings relieved the tenant from paying rent during the period of the taking, which is *not* the rule in California but *is* the rule in some states (*Cf. Pasadena v. Porter,* 201 Cal. 381, 387, 257 Pac. 526, 528), then the lessee would not have that *continuing obligation* and could not *collect for it* from the condemnor.

On pages 36 and 37 of their Opening Brief, Gawzners blandly state:

> "* * * In the case at bar if the rental payable by Lebanbaum to Gawzners had been a flat sum of so many dollars per month, it would be readily conceded, we believe, that after determining the amount of restoration the remainder of the compensation recovered from the United States would have been payable first to Gawzners in the amount of such rent reserved by the lease, and the remainder, if any, to Lebenbaum as the bonus value of his lease * * *."

We ask for authority. We have found none. Instead, as we have shown, the Federal law, the State law and the weight of authority is *just the opposite!* As epitomized in the *Leonard* case (L.O.B. p. 40) 325 Ill. App. 375, 391, 60 N. E. 2d 457, 464:

> "Lessor will have no claim * * * *against the Government,* since the Government will not have appropriated any interest of lessor's in the premises * * *."

And, of course, the fund represented the *claims against the Government* (L.O.B. p. 51).

Gawzners' contentions on this point require consideration of two other matters:

First, if the present judgment is affirmed, or if any subsequent modification thereof awards to Gawzners any portion of the contract rental for the period of the Governments occupancy of the leased area, Gawzners will have collected from the Government, by judicial decree, moneys which *they could not have collected from the Government,* and which the Government owed to Lebenbaum!

The Government, of course, is protected because it has paid the money into court and it is not concerned with how or to whom it is distributed (*U. S. Dunnungton,* 146 U. S. 338, 351, 36 L. Ed. 996, 1001), but Lebenbaum would have *no protection or defense* from a full recovery of the accrued rental under the lease brought in any court of competent jurisdiction. This is necessarily true, because:

(a) under the controlling California law, a taking of a part of a lease does not release, apportion, abate, modify or suspend the full contract liability of the lessee to pay the full accrued rent. (*Pasadena v. Porter, supra.*)

(b) since neither this court nor the trial court has *jurisdiction* in this cause to determine and enforce the rights and obligations of the appellants as between themselves, *as distinct from their rights to collect from the Government* (L.O.B. pp. 49-55) Gawzners could not *confer* such jurisdiction by consent nor be estopped thereby to assert in the later litigation that the decree *must* be construed as a distribution of the eminent domain obliga-

tion running from the Government to them, and, hence, as not affecting or including Lebenbaum's contract liability over which the court rendering the eminent domain judgment had no jurisdiction.

(c) neither this court nor the trial court is an agent of the Government (*Cromelin v. U. S.*, 177 F. 2d 275). Hence, if Gawzners did subsequently collect from Lebenbaum the contract rental under the lease, he would have no way to assert and enforce reimbursement for the moneys which the Government, through the court, had erroneously paid to them.

Second, the record discloses that paragraph Ten of the lease has been construed by two trial judges and that their construction appears to be consistent with the true intent of the parties:

> "* * * and where that is the case, the appellate court will not substitute another interpretation, though it seems equally tenable."
>
> *Hart v. California Pacific T. and T. Co.* (9th Cir.), 136 F. 2d 430, 432.

2. Lebenbaum asserts that the learned trial judge erred in failing to fix the *agreed* rental value of both areas and in failing to award *all* for the leased area to him and all for the unleased area to Gawzners (L.O.B. p. 45). This could have been done in a number of ways and it was not error for the Court to receive evidence as to market rental value of both areas in order to compare the totals with the agreed rental and to *reduce each ratably.* Such was the Court's obligation in order to construe the stipulation between the parties so as to produce *equitable* as distinct

from *inequitable* results. (*Stratford Co. v. Continental Mtge. Co.*, 74 Cal. App. 551, 555, 241 Pac. 429, 431.) But the Court erred when it awarded *part* of the *agreed rental for the leased area* to Gawzners.

Gawzners assert intermediate *errors as to admission of evidence*. Viewed in the light of departures from the agreed values, we agree in part as hereinafter noted, but, viewed as intermediate evidence of market rental value to be used in dividing up the agreed rental, we disagree.

In so far as the intermediate steps of ascertaining market rental value of the leased area were concerned, the Court erred in receiving and failing to strike Gawzners' evidence as to *bonus* value, since *such value* was incompetent, irrelevant and immaterial. It was incompetent because the rental value had been fixed by agreement. Hence, whatever was left after ascertaining and deducting the *agreed* rental for the unleased area was the agreed rental for the leased area, irrespective of what otherwise would have been the constitutional measure of just compensation (L.O.B. p. 44). It was irrelevant because bonus value has no relevancy where the *whole* compensation is due the tenant (L.O.B. p. 56). It was immaterial because it would neither support nor deplete the rental due Lebenbaum as agreed rental for the leased area.

We shall now consider Gawzners' contentions:

(G.O.B., Points 13, 14 and 15, pp. 11-13). A reasonably accurate summary of Exhibits A and B and of Pettegrew's testimony is set forth in portions of Judge Weinberger's opinion of August 25, 1948 [R. 160-162; 172-175] and in Gawzners' Opening Brief (G.O.B. pp. 5, 29-32). The foundation for such testimony had been laid

in the testimony of Gawzners' witnesses, Allen and Frisbie. Allen stated: There was no *similar lease* known to him in or near the vicinity [R. 378-381] and there was no *similar property* of such age nor which had so scattered a layout [R. 378]. Frisbie knew of no *similar lease* or *similar property* [R. 393, 394, 397, 408, 409, 416]. Hotel properties and leases were *scarce* and had reached a peak for earnings [R. 399-400]. He *considered* reports of its earning experience [R. 398], and *conceded that a prospective lessee would have done so* [R. 403-406; 419-422], but *ignored* such matters on advice of Gawzners' counsel [R. 411]. The Court made a finding to such effect [R. 232; F. 26], which is not challenged by Gawzners. We believe the Supreme Court has settled the rule that evidence of past and prospective earnings is admissible where no *real* market exists, where the taking is temporary and affects a *service* property (*U. S. v. Miller,* 317 U. S. 369, 374-375, 87 L. Ed. 336, 342, 343; *Kimball Laundry v. U. S.,* L. Ed. Adv. Opin. 1420. *Cf. Brooklyn etc. v. N. Y.,* 139 F. 2d 1007, 1013; *Monongahela Nav. Co. v. U. S.,* 148 U. S. 312, 37 L. Ed. 463, 468; *Montana R. Co. v. Warren,* 137 U. S. 348, 352, 34 L. Ed. 681).

Pettegrew testified that one method of evaluating hotel leases used in this area is to estimate prospective and ascertain previous, earnings and calculate the number of times of earnings the lease is worth [R. 465].

> "Artificial rules of evidence which exclude from consideration matters which men consider in their everyday affairs hinder rather than help in arriving at a just result. * * *."
>
> *U. S. v. 25406 Acres of Land, etc.,* 172 F. 2d 990, 995.

Gawzners also assert errors in intermediate *findings* by the trial court. We have already shown that the Court was right and Gawzners are wrong as to Specification 4, subdivisions a to h, inclusive (G.O.B. pp. 8-9). As to Finding 17 [R. 227-228], we think the trial court is technically correct on this record but factually incorrect on the true record because the *compensation for time* required for restoration, *i. e., for* the period of *deprivation of use,* would be *rent* [R. 121]. The short answer is that the finding is immaterial. The parties had *settled* such issues by their stipulation [R. 98] and receipt of such part of the funds [R. 103; 265, par. 22]. The issue as to *what items were included as rent* was immaterial. The parties had *agreed the unpaid balance was rent!* Finding 18 [R. 228] is factually accurate and is supported by the evidence [R. 401, 478, 483].

Finding 19 [R. 228] is also factually accurate and is supported by the evidence. It is material because it supports Findings 20 [R. 230] and 22 [R. 231], and the Court's action in *ratably reducing* the allowance for rent of the unleased area. The record clearly discloses (a) that Lebenbaum was *not* required to make restoration for ordinary wear and tear and damage by the elements. [Paragraph Seventeen, R. 294]; (b) that the amount stipulated [R. 98] and paid [R. 265, par. 22] included such excluded items [R. 435] and (c) there was no segregation of liabilities as between appellants [R. 358-362] and (d) that the stipulated judgment against the Government *did not include compensation for ordinary wear and tear* [R. 55].

Finding 22 [R. 231] is *incorrectly* described by Gawzners (G.O.B. p. 11). The Court does not find that the

sum of $113,704.00 does not represent a sum which can be found to be the compensation for use. He found that it cannot be found to be the *entire* compensation for the use. This is an accurate finding if it means by the term "entire compensation," the equivalent of *market* rental value. It is erroneous, however, if it means that such sum is not the entire sum which the parties, by agreement, have fixed as the *equivalent of market rental* for the leased and unleased areas. As we have shown (L.O.B. p. 56) this error can be cured without a reversal of the judgment and without further evidence being taken by a simple remand with directions.

Finding 27 [R. 232] is supported by the testimony of Pettegrew [R. 425-435; 448-486] and Exhibits "A" and "B" [R. 310-331]. Also, by that of Frisbie [R. 399-400]. Finding 28 [R. 233] is doubtful because Frisbie testified that the market rental value of the leased area was $161,-500.00 [R. 400]. Gawzners, however, may not complain. They offered *no* evidence as to the market rental value of the leased area and *confined* their evidence to *alleged lack* of bonus value. Having offered no evidence on the issue they may not complain of the Court's finding that none was given. Furthermore, they had *no interest whatever* in the rental paid by the Government for the use of the leased area (L.O.B. pp. 46-48). Their present counsel, Mr. Burrill, once admitted [R. 146]: "There can be no apportionment of a fund that was not recoverable from the condemnor." In other words, if Gawzners could not have collected from the Government for its use of the leased area, they had no right to share in the money which the Government paid into Court *for such use.*

Lebenbaum has complained of the error in Finding 29 [R. 29; L.O.B. p. 45] but ask that it be corrected on remand (L.O.B. p. 56).

Under Specification 4e (G.O.B. p. 9) Gawzners refer to an alleged error of the trial court in failing to award them the *reasonable value* of the use of the leased area. This was not error. They were entitled to their *contract rent* as fixed in the lease *as against Lebenbaum* but were entitled to *nothing for the leased area* as against the Government and, in this case, the trial court could only determine and apportion their claims and Lebenbaum's claim *against the Government!* (L.O.B. pp. 34-41).

III.

The Court Did Not Err in Ratably Reducing the Agreed Rental Apportioned for the Unleased Area.

The evidence disclosed (a) that the market rental value of the leased area was $161,500 [R. 400; 412]; (b) that that of the unleased area was $10,950 [R. 382, 395], and the parties agreed that the restoration damage was $91,296]R. 98]. These added together total $263,746. However, the parties had agreed with the Government that $205,000 represented such items [R. 45]; thus, by agreement, ratably reducing *agreed* value to *77.7%* of *market* value. The Court was *right* in making such ratable reduction. Its error was in awarding Gawzners part of the rental award for the leased area.

IV.

The Court Did Not Err in Refusing Leave to File Portions of Gawzners' Proposed Cross-Complaint.

We do not read the *Galvin* case (164 F. 2d 791) to hold that the trial court, in an eminent domain proceeding, has jurisdiction over issues occurring after the period of the taking has expired, but if it does, the Court below did not *retain* such jurisdiction [R. 58; 103-104] and the appellants, by agreement, had eliminated such matters from the award in this case [R. 85]:

> "* * * that this agreement shall be effective only for the period subsequent to June 1, 1946, and shall not be construed to have any effect upon the award or the share or shares thereof which said parties are entitled to receive in the above-referred-to action."

V.

The Court Properly Refused to Approve the Findings Submitted by Gawzners.

That such point is without merit is shown by the fact that Gawzners make no argument in its support. A mere reading of such proposal discloses that the findings by the Court [R. 214] include every proper and material fact which is referred to in the proposed findings.

Conclusion.

It is respectfully submitted that there is no merit to the Specifications of alleged error by appellant, Gawzner, and that this Honorable Court should remand the cause to the trial court with directions:

1. To find that the parties by agreement have fixed the rental compensation for the leased and unleased area, in the sum of $113,704;
2. To find that such sum by agreement, represents 77.7% of the market rental value of said leased and unleased areas;
3. To find that the agreed reduced rental value of the unleased area is the sum of $8,508.00 and that the agreed reduced rental value of the leased area is the sum of $105,196.00;
4. To conclude that judgment should be rendered awarding the sum of $19,403.98 to Gawzners and the sum of $91,023.77[1] to Lebenbaum, and to enter judgment accordingly.

Respectfully submitted.

IRL D. BRETT,
PAUL R. COTÉ,
By IRL D. BRETT,
Attorneys for Appellant Leo Lebenbaum.

[1]While the awards would normally be: Gawzner's $8508.00 and Lebenbaum, $105,196.00, the Government was entitled to a credit for $1594.02 which had been paid to Gawzners [R. 264, par. 14] which would reduce their award to $6903.98, then Lebenbaum had assigned $12,500.00 of his award to Gawzners as security for his liquor license [R. 60] which would increase Gawzner's award to $19,403.98. The Government had exercised an offset of $1672.23 against Lebenbaum [R. 265, par. 20]; this reduced his award to $103,523.77. His assignment of $12,500.00 as security for the liquor license [R. 60] reduces his award to $91,023.77.

APPENDIX I.

HILL, MORGAN & FARRER
Attorneys at Law

1007-1022 Title Guarantee Building
Fifth Street at Hill

Los Angeles 13, California
April 19th, 1947.

Mr. Leo Lebenbaum
Miramar Hotel
Santa Barbara, California

Re: Paul Gawzer, *et al.* vs.
Leo Lebenbaum, *et al*
pending in the Superior
Court State of California
in and for the County of
Santa Barbara—#39518

Dear Mr. Lebenbaum:

I have been instructed by my clients, Mr. and Mrs. Paul Gawzner, to give you the following information in reference to the above litigation.

That on February 24, 1947, said Paul Gawzner and Irene Gawzner caused to be served upon you by registered mail a notice, copy of which notice is marked "Exhibit C" attached to the complaint in the above entitled proceedings, which said notice in substance advised you that you were violating the agreement of July 23, 1946, and that your right to continue the occupancy of said premises was forfeited and terminated and said notice demanded that you surrender the premises therein referred to to said Paul Gawzner and Irene Gawzner and which said notice further demanded that you cease using said premises by

charging rates in excess of that authorized by the Office of Price Administration.

That on March 3, 1947, said Paul Gawzner and Irene Gawzner caused to be served upon you a notice in writing, a true copy of which is marked "Exhibit D" attached to the complaint in the above entitled proceedings, which said notice advised you that you were violating the aforesaid agreement of July 23, 1946, in the particulars set forth in said notice and demanded that you remove from and deliver up to the plaintiffs possession of the premises therein described within three (3) days after service upon you of said notice.

That you have failed to deliver up possession of said premises and continue to remain in possession thereof and, accordingly, the above entitled action in unlawful detainer was commenced and the same was served upon you March 7, 1947, and it is the intention of said Paul Gawzner and Irene Gawzner to continue to prosecute the same.

You are further advised that your check No. 1044 issued March 1, 1947, payable to the order of Paul Gawzner in the amount of $1500 on the Miramar Hotel account was returned to you under date of March 3, 1947, and received by you on March 5, 1947, and that said check was returned for the reason that you had theretofore been served with notices demanding the return of the possession of the Miramar Hotel for the reason that you were in default under the agreement by which you held the same.

Since you have continued to hold possession of said premises contrary to said notices and contrary to the demands heretofore made upon you and have continued to have the use of said premises, please be advised that your check No. 1059 dated March 10, 1947, payable to the

order of Paul Gawzner in the amount of $3,815.95, your check No. 1167 dated April 1, 1946, payable to the order of Paul Gawzner in the amount of $1,500 and your check No. 1244 dated April 10, 1947, in the amount of $4,228.45 have been credited by said Paul Gawzner and Irene Gawzner against your obligation for the reasonable rental value of said premises while you have retained the same contrary to said notices and against the wish and desire of said Paul Gawzner and Irene Gawzner, such credit, of course, will be conditioned upon said checks being paid by the bank upon which they are drawn at face value.

Please be further advised that these payments are being accepted without any intent or purpose to recognize your right to occupy said premises, nor are they accepted with any intent to condone or waive your claimed defaults, but are accepted and credited solely against your obligation for the reasonable rental value of the use of said premises, which you are exercising contrary to the wish and desires of said Paul Gawzner and Irene Gawzner and contrary to your contractual obligations to them.

Yours very truly,

/s/ Stanley S. Burrill,
Stanley S. Burrill
of
Hill, Morgan & Farrer.

SSB:es

Registered Mail

cc—Messrs. Paul R. Cote and
Thos. H. Hearn

cc—Mr. Laselle Thornburgh.

APPENDIX II.

In *Leonard, et al. v. Auto Car Sales & Service Co.*, 60 N. E. 2d 457, 464, 325 Ill. App. 375, 390, the court held:

"Under the 5th amendment to the Constitution of the United States both plaintiffs and defendant are guaranteed just compensation for the taking of whatever interests they have in the demised premises. As in our opinion the lease has not been terminated, defendant (lessee) is guaranteed the right to recover the reasonable value of that portion of its leasehold estate which has been appropriated by the Government in the pending condemnation proceedings in the Federal Court. Plaintiffs (lessors) will have no claim for the reasonable value of the use of the premises against the Government, since the Government will not have appropriated any interest of plaintiffs in the premises * * *."

The Illinois Supreme Court affirmed and said (64 N. E. 2d 477, 483, 392 Ill. 182, 195):

"We are satisfied that the judgment of the appellate court is right, and it is affirmed."

Thereafter, the federal Supreme Court denied certiorari (327 U. S. 804, 90 L. Ed. 1029) and denied a rehearing (328 U. S. 878, 90 L. Ed. 1646) on the merits and not because of lack of a federal question.

Since the right of the lessor to share in the condemnation award was the *sole federal question* raised or discussed in the lower court decisions, the federal Supreme Court must be deemed to have found no error therein.